

February 7, 2007

The Honorable Michael Chertoff  
Secretary  
Department of Homeland Security  
Washington, DC 20528

Subject: RIN 1601-AA47, Chemical Facility Anti-Terrorism Standards

Dear Secretary Chertoff:

I am writing to express my strong concerns about the Department of Homeland Security's proposed regulations regarding the chemical security program authorized by Section 550 of the Department of Homeland Security Appropriations Act, 2007 (P.L.109-295), particularly as the proposed regulations address the issues of preemption of State and local laws, information sharing, judicial review and safer technologies.

At the outset, let me express my appreciation that the Department of Homeland Security (DHS) is moving ahead expeditiously on this vital program. Further, I am pleased that the Department is soliciting comments on proposed regulations. While the Department is not technically required to seek advance comment for interim final regulations such as these, I think the Department has made a wise decision in choosing to do so, and I welcome the opportunity to convey my views as well as to review the comments of others regarding the proposed regulations.

Lawmakers devoted considerable attention to chemical security during the 109<sup>th</sup> Congress. The Senate Homeland Security and Governmental Affairs Committee, which I now chair, held four hearings on the issue and unanimously reported out legislation to establish a chemical security program within DHS (The Chemical Facility Anti-Terrorism Act of 2006, S. 2145, S.Rept. 109-332). The House Homeland Security Committee approved similar legislation (H.R. 5695). Unfortunately, neither bill advanced to consideration on the floor. Ultimately, the only avenue available for lawmakers seeking to address the urgent matter of chemical site security was the DHS appropriations bill, and most of Section 550 was written during conference committee deliberations. Because Section 550 is a fairly brief provision with limited legislative history, I think it is appropriate for DHS to look to the House and Senate chemical security authorization bills for guidance on the type of chemical security program Congress was contemplating.

I am pleased to see that the proposed regulations do track some of the core ideas of S. 2145. For instance, the Department plans to receive and review vulnerability assessments and security plans for all covered facilities, and to use risk tiers for those posing the greatest security risk. Unfortunately, the proposed regulations depart from the House and Senate chemical security bills in some critical respects, and I wish to comment on several key aspects of the program where I believe the regulations are seriously flawed and could have a very harmful

impact. Among my most serious concerns are the treatment of possible preemption of more stringent State and local laws regarding chemical security, the lack of accountability for the proposed program, and the failure to encourage the use of safer chemicals and technologies to reduce security risk.

*Scope of the Chemical Security Program*

I am also concerned that the proposed regulations give no indication of how many facilities are likely to be covered by the chemical security program, and I urge the Department to be sure that it incorporates the full range of facilities that pose a significant security risk. While it would be unwise and unfeasible to regulate every facility that handles any amount of hazardous chemicals, it is important that we take steps to ensure at least basic security at facilities that could endanger a significant number of people or otherwise put the security of the Nation at risk. During consideration of Section 550, lawmakers enlarged the scope of the provision to address facilities that pose a “high,” rather than just the “highest” or “greatest,” degree of risk, reflecting lawmakers intentions that even a stopgap program immediately reach a significant number of facilities.<sup>1</sup> I am encouraged that the Department apparently plans to screen a wide array of facilities to determine their risk level. However the Department then proposes to separate the covered facilities into tiers and to address the tiers in phases. This raises the possibility that only a small number of facilities will be required to submit vulnerability assessments and security plans, and to have those plans reviewed by DHS, in a timely manner. I strongly urge the Department to impose meaningful requirements and deadlines on all chemical facilities that are subject to a significant risk of terrorist attack. Further, this assessment should not be driven by the Department’s resource constraints; once the Department has identified the proper scope of high risk facilities, it should seek the necessary funding to incorporate them promptly into the security program.

*Employing Less Dangerous Chemicals and Technologies*

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<sup>1</sup>As originally approved in the Senate, §550 of H.R. 5441 would have applied to those chemical facilities “that the Secretary determines present the greatest security risk....” During House-Senate conference negotiations, it is my understanding that lawmakers debated applying the regulations to chemical facilities that posed the “highest” levels of security risk but instead decided to extend the program to facilities that present a “high” level of security risk.

During consideration of the House and Senate chemical security bills, there was considerable discussion of the extent to which using less dangerous chemicals or technologies could help deter a terrorist attack on a facility, or help limit the consequences if an attack does occur. S. 2145 encouraged chemical facilities to consider such approaches, first by specifying that a vulnerability assessment address the possible consequences of a terrorist incident presented by the nature and amount of dangerous chemicals on site,<sup>2</sup> and then by specifying that such approaches would be an appropriate “security measure” to include as part of the facility’s security plan.<sup>3</sup> The House chemical security bill went further and would have required that facilities with the highest security risk review safer technology options and implement them where feasible.

I am consequently disappointed and concerned that the proposed regulations make no mention of using safer chemicals and technologies to help reduce risk. The central mission of a chemical security regulatory program is to reduce the risk of a terrorist event at these facilities. One of the most effective ways to reduce risk is to reduce the consequences of an attack, and for some facilities the most effective way to reduce those consequences will be to reduce the amount of deadly chemicals on site, modify the way they are made, or substitute safer chemicals. It is common sense that if a facility owner can replace a deadly chemical with a safer chemical that would not kill tens of thousands of people, then at the very least DHS should be able to discuss such a consequence-reducing measure with the owner of the facility. I urge DHS to incorporate this concept into the proposed regulations. While the underlying legislation does not permit DHS to require implementation of a safer chemical or technology – or indeed of any particular security measure – there is no reason covered facilities should not be directed, or at a bare minimum encouraged, to consider these approaches as a way to reduce risk at their facility and thereby satisfy the requirements of the planned performance standards.

#### *Preemption*

I am disturbed that the proposed regulations claim to preempt certain State and local measures affecting those chemical facilities that would also fall within the federal chemical security program. The Department of Homeland Security is not the only body that can and should help ensure the safety and security of the Nation’s chemical facilities. States and localities have long regulated such facilities to address vital safety and environmental concerns. Since 9/11, some States have also moved to require security improvements at these facilities. These State and local protections are critical companions to our effort at the Federal level and should

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<sup>2</sup>S. 2145, § 4(a)(5)(D), specifying that vulnerability assessments include an analysis of “the sufficiency of security measures in place when the vulnerability assessment is prepared relative to the threats and consequences of a terrorist incident, including vulnerabilities at the chemical source arising from the nature and quantities of substances of concern and the use, storage or handling of substances of concern.”

<sup>3</sup>S. 2145, § 2(11)(B)(vii).

not be displaced unless there is an absolute conflict, such that it is impossible to comply with both the Federal law and a State or local law or regulation on chemical security. Unfortunately, the Department has injected itself into the preemption issue and has articulated an approach that appears likely to result in unnecessary and potentially harmful preemption of State and local laws.

The Department's regulations should remain silent on preemption, as Congress did and as it intended the Department to do. It is clear from the legislative history that Section 550's silence on the question of preemption was a deliberate policy decision by Congress, not simply an oversight. S. 2145 included a strong "non-preemption" provision indicating that the federal regulation should only displace a state or local regulation where there was a direct and unavoidable conflict.<sup>4</sup> During committee consideration of the bill, senators rejected an amendment that would have established much broader preemption.<sup>5</sup> The House chemical security bill also reflected a desire to preserve the ability of States and localities to enact stricter security regulations or other provisions regulating chemical facilities. During negotiations over Section 550, lawmakers reportedly turned away efforts to include language clearly indicating an intent to preempt State and local regulation of chemical security.<sup>6</sup> Moreover, during House floor debate on the adoption of the DHS appropriations bill and Section 550, Rep. Peter King, then chairman of the House Homeland Security Committee and one of the parties to negotiations on Section 550, specified his understanding that the provision would not preempt a stricter state regulation.<sup>7</sup>

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<sup>4</sup>S. 2145, § 10, stating "Nothing in this Act shall preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance respecting chemical facility security that is more stringent than a regulation, requirement, or standard of performance in effect under this Act, or shall otherwise impair any right or jurisdiction of the States with respect to chemical facilities within such States unless there is an actual conflict between a provision of this Act and the law of the State." The provision further states "Nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance, including air or water pollution requirements, that are directed at problems other than reducing damage from terrorist attacks."

<sup>5</sup>S.Rept. 109-332 at p.30.

<sup>6</sup>*The Wall Street Journal*, September 25, 2006, p.A2, "Chemical-Security Legislation Nears Approval," noting industry's failure to win desired language to clearly preempt state and local regulations on chemical security.

<sup>7</sup>Congressional Record, September 29, 2006, H7967:

Mr. SABO: ...Mr. Speaker I have read the chemical bill language and I do not understand whether that language preempts the ability of a State to adopt more stringent requirements than the Federal standards.

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Mr. KING: Mr. Speaker, will the gentleman yield?

Mr. SABO: I yield to the gentleman from New York.

Mr. KING of New York: Mr. Speaker, it is our understanding, and we had the opinion of committee counsel on this, that it does not preempt States."

Mr. SABO: The intention is not to preempt the ability of the States.

Mr. KING: That is not the intention."

Thus, lawmakers had considered and rejected provisions that would have explicitly broadened or narrowed the preemptive force of the federal chemical security program. By remaining silent on the subject, Congress expressed its decision to allow the existing law of preemption to apply. That law includes a well-established “presumption against preemption,” a legal doctrine providing that when courts consider a preemption challenge, they should start with the assumption that the historic powers of the States should not be superseded unless it was clearly the intent of Congress to do so.<sup>8</sup>

Furthermore, the temporary nature of the Section 550 authorization underscores the fact that it was not intended to displace permanent state and local laws. Indeed, it would make no sense to do so. Section 550 authorizes only interim, not final, regulations and specifically anticipates that they will be superseded by subsequent legislation. As a further check, the legislation specifies that the authority for the interim regulations ends three years after enactment.

Despite the Congress’ deliberate silence on the matter of preemption, the proposed regulations and accompanying discussion address preemption extensively and do so in a way that seems calculated to imperil State and local laws. The Department’s proposed language on preemption is overbroad. It states that a state or local law should be preempted if it “conflicts with, hinders, poses an obstacle to, or frustrates the purposes of these regulations or of any approval, disapproval or order issued thereunder.”<sup>9</sup> Contrast that with the Senate bill’s provision

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<sup>8</sup>See, e.g. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947) (stating the analysis should start with “the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”); *Maryland v. Louisiana*, 451, U.S. 725, 746 (1981) (stating that a court’s preemption analysis should begin with “the basic assumption that Congress did not intend to displace state law”).

<sup>9</sup>Proposed 6 C.F.R. § 27.405(a).

indicating an intent to preempt only where there is an “actual conflict” with the federal statute. Additionally, the Department appears to set up a false test to establish whether a State or local measure should be preempted. The Department correctly notes that Section 550, by calling for performance standards, allows facilities certain flexibility in meeting security requirements. However, the Department goes on to assert that “[a] state measure frustrating this balance will be preempted.”<sup>10</sup>

This is an incorrect reading of Section 550. S. 2145 similarly called for a flexible federal program, with performance standards, but did not view that as inconsistent with States setting higher standards – as evidenced by the strong anti-preemption language included in the bill. The purpose of a federal chemical security program is not “flexibility,” it is “security.” There is no intention or need to preempt State or local programs that would further enhance security at these facilities, including laws or regulations that require a specific security measure.

Given the Department’s lengthy discussion of the preemption issue, I am also concerned that the Department makes no mention of what should clearly not be preempted. Both the House and Senate bills included language specifying that Congress did not intend to displace laws aimed at health, safety and the environment. There is no such recognition of that distinction in the Department’s proposed regulations or related discussion.

#### *Accountability*

I am deeply concerned that the proposed regulations regarding treatment of sensitive information and judicial review will create a chemical security program that is overly secretive and without necessary oversight.

*Handling of Sensitive Information:* Of course, none of us would want the Department to release sensitive information about a chemical plant if the information would be useful to a terrorist. The Department should also be scrupulous about safeguarding trade secrets or other business confidential information submitted by a chemical company in compliance with this chemical security program. However, excessive secrecy in a government security program can actually makes us less, not more safe. This is because some degree of transparency is necessary to help us make government programs more accountable and effective. Also, local communities and their elected officials deserve to know whether local facilities are being kept safe against a terrorist attack, and the community’s vigilance can help make us all safer.

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<sup>10</sup>71 Fed. Reg. at 78293, apparently referring to what DHS describes as Congress’ intent to create a “carefully balanced regulatory relationship between the Federal government and chemical facilities.”

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The proposed rules define a new class of sensitive-but-unclassified information, called “Chemical-terrorism Security and Vulnerability Information,” or “CVI”, and then establish requirements to make CVI available only to individuals with a “need to know.”<sup>11</sup> I am very concerned that these proposed rules do not strike the right balance and would instead lead to excessive secrecy that could damage, rather than promote, our security.

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<sup>11</sup>Proposed 6 C.F.R. § 27.400.

It is particularly troubling that the proposed secrecy rules could shield critical programs from effective oversight. S. 2145 attempted to carefully tailor the information protections to those documents with information about a specific facility that poses some actual security risk if disclosed. Here, by contrast, the proposed restrictions cast a much larger net that could cloak virtually all information related to the program. Of course, vulnerability assessments and site security plans will often contain highly sensitive material, and the proposed rules properly safeguard these submissions and the sensitive information contained in them. However, it is unnecessary and excessive for the proposed rules to also categorically sweep into the CVI definition any and all documents relating to the review and approval of vulnerability assessments and site security plans,<sup>12</sup> and any and all information developed under the portions of the security program relating to ascertaining the security risk for a chemical facility and determining whether a chemical facility "Presents A High Level Of Security Risk."<sup>13</sup> The proposed rules also grant unfettered discretion for DHS to make secret "[a]ny other information that the Secretary, in his discretion, determines warrants the protections set forth in this part."<sup>14</sup> This exceedingly broad authority goes beyond protecting documents containing sensitive information about a facility that could cause harm if released; they could also encompass essentially all documents related in any way to the implementation and management of these vital security programs, largely shielding them from the oversight and accountability that are essential to keeping them effective.

Another troubling provision of the proposed rules states that DHS has discretion to refuse release of part of a record under FOIA that contains no CVI, just because another part of the same document does contain CVI.<sup>15</sup> This proposal is at odds with longstanding FOIA mandates and practice. Aside from the fact that there seems to be no justifiable reason for such a proposal, this would contradict the terms of FOIA itself, which specifies that "[any] reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the

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<sup>12</sup>Proposed 6 C.F.R. § 27.400(b)(3).

<sup>13</sup>Proposed 6 C.F.R. § 27.400(b)(8).

<sup>14</sup>Proposed 6 C.F.R. § 27.400(b)(9).

<sup>15</sup>Proposed 6 C.F.R. § 27.400 (g)(2).

portions which are exempt under this subsection [552(b)].” If a portion of a requested record contains no CVI and is reasonably segregable from other parts of the record that do, there is no authority or justification for withholding that CVI-free portion unless some other FOIA exemption or exclusion applies.

Just as troubling is what the regulations do not say. There is no discussion of what information about the program can and should be made available to provide some measure of public accountability regarding the program. For example, the proposed rules declare that sensitive portions of orders, notices, and letters issued under the program will be CVI.<sup>16</sup> While this provision appropriately does not declare that such documents will always be classified as CVI, nor does it state that enough non-sensitive portions of such documents will be available to enable Congress and the public to see whether the program is being effectively implemented. It is unclear whether even basic information about which facilities are covered or whether a certification has been granted would ever be public knowledge. Compare S.2145, under which orders and certifications would generally be released to enable the community to know whether they are being kept safe and to keep the program accountable. But the bill also allowed the Secretary to postpone the release of any order or certification as long as necessary, whether to give the source time to fix a problem, or for any other reason if the Secretary thinks that release would risk security.

Also notably absent from the proposed rules are the limitations and clarifications, found in many comparable programs, to ensure that this program does not unintentionally encroach on other specific programs where some degree of information disclosure is vital. For instance, the proposed CVI program should not be used to evade or disrupt existing reporting requirements under health, safety, and environmental programs or to limit Congressional oversight. I assume that the Department does not intend to stray into this territory, but given the extensive provisions regarding the proposed new information restrictions it would be helpful to include specific reassurance on matters such as the following:

- The proposed CVI regulations do not authorize information to be withheld from Congress or GAO.
- The CVI requirements do not affect the extent to which information is available to the public that is in a document submitted by a chemical facility under any environmental or other law or program. For example, when a chemical facility submits documents to EPA under its Risk Management Program, the extent to which EPA and others should be authorized or required to disclose some or all of those documents ought to be governed by statutes applicable to the Risk Management Program, even if the chemical source has incorporated some of that same information into other documents submitted to DHS under its chemical safety program.

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<sup>16</sup>Proposed 6 C.F.R. § 27.400(b)(7).

- The proposed CVI regulations do not curtail the right of an individual to make a disclosure protected or authorized under whistleblower protections statutes<sup>17</sup> or under the Lloyd-La Follette Act protecting employees' right to inform Congress.<sup>18</sup>

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<sup>17</sup>Including 5 U.S.C. § 2302(b)(8) - (9).

<sup>18</sup>5 U.S.C. § 7211.

The proposed regulations also appear overly restrictive with respect to who may access CVI. Although the proposal states that DHS will provide for appropriate information sharing with state and local first responders, the CVI proposal goes on to lay out a framework that would render such sharing extremely difficult. Information could be made available only upon demonstration of a “need to know,” and would possibly be contingent on completion of a background check.<sup>19</sup> Even this access could be further restricted based on DHS discretion.<sup>20</sup> This approach threatens to undermine current efforts to forge an Information Sharing Environment, which seeks to clear away unnecessary restrictions to information sharing and generate systems and attitudes that encourage greater sharing with State, local and tribal counterterrorism partners. I urge DHS to make sure that the regulations will enable the Department to fulfil its vital responsibility to share information with State, local and tribal officials where appropriate -- as well as with Congress and the GAO, as noted earlier.

I would also caution DHS to rethink the portion of the regulations governing disclosure in civil or criminal litigation, and to limit those provisions to the authority delegated to the Department. Section 550(c) states that, in any enforcement proceeding, certain sensitive information under the program “shall be treated as if the information were classified material.” As applied to a judicial proceeding, this provision constitutes a directive to all involved in the proceeding – the parties and the court. Nothing in the statute delegates to DHS the authority to issue binding regulations to govern a judicial proceeding. It may be helpful for DHS to publish regulations that express its own policies and interpretations, in order to afford others guidance as to what DHS’s preferred practices will be when litigation arises – subject, of course, to any court order that may be directed at the Department. However, it exceeds the authority that Congress delegated for DHS to instruct the courts how to handle CVI.

Finally, it is unfortunate that the Department is proposing to create the concept of CVI as yet another category of sensitive-but-unclassified information. This approach promises to add to the confusing tangle of such designations that have sprung up in recent years without any clear need to do so. Instead, I urge the Department simply to specify protocols to provide for the protection of specified sensitive material, as we did in S. 2145, without creating a new designation.

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<sup>19</sup>Proposed 6 C.F.R. § 27.400(e)(3).

<sup>20</sup>Proposed 6 C.F.R. § 27.400(e)(3)(i).

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*Judicial Review:* I am also very concerned by the proposal as it relates to judicial review. Section 550 includes a provision stating that “nothing in this section confers upon any person except the Secretary a right of action against an owner or operator of a chemical facility to enforce any provision of this section.” Inexplicably, the Department has interpreted this provision to prohibit “any effort by a State or local government or other third party litigant to enforce the provisions of Section 550, or to compel the Department to take a specific action to enforce Section 550.”<sup>21</sup> This interpretation goes far afield from the underlying provision, which seeks to limit a private enforcement action against a facility, and attempts to craft it into a shield for DHS itself. As articulated in the proposed regulation, the provision could even block certain basic challenges to DHS management of the program under the Administrative Procedures Act. I strongly urge the Department to return to a more natural reading of Section 550, which is simply to specify that that law does not create a new cause of action for individuals or groups to sue covered facilities for failure to comply with the Department’s chemical security rules.

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The combined effect of the proposed language on information protection and judicial review appears to be to create a virtual “black box,” within which DHS would have sole knowledge and discretion regarding the program with no real opportunity for any outside accountability, be it by Congress or the public. This is not a strategy for good security or good government. In other areas we have found better ways to balance competing concerns of security and accountability and I urge the Department to revisit these proposed regulations with a view toward ensuring greater accountability.

Thank you for your consideration of these views and I look forward to working with you to strengthen the security of our Nation’s chemical facilities.

Sincerely,

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Chairman

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<sup>21</sup>71 Fed. Reg. at 78291 (emphasis added).